A

TENG KOK SOENG & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
[CRIMINAL APPEALS NO: W-05-468-2010
C & W-05-469-2010]
1 NOVEMBER 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Conviction and sentence - Appeal against - Trafficking in mixed heroin*
D *and monoacetylmorphines - Charge adverting to 'mixed heroin' - Chemist report confirmed type and quantity of drugs - Whether charge against appellants defective - Failure to call material witness - Whether fatal to prosecution's case - Whether appeal devoid of merit*

CRIMINAL PROCEDURE: *Charge - Ingredients - Trafficking in dangerous*
E *drugs - Charge adverting to "mixed heroin and monoacetylmorphines" - Chemist report confirmed type and quantity of drugs - Whether charge defective*

EVIDENCE: *Witness - Failure to call material witness - Facts and*
F *circumstances of case - Whether calling or non-calling of material witness affected prosecution's case - Whether adverse inference under s. 114(g) Evidence Act 1950 could be invoked*

The appellants were convicted and sentenced by the High Court
G for an offence of drug trafficking under s. 39B(1)(a) Dangerous Drugs Act 1952. In urging this court to quash the conviction, the appellants submitted that the charge preferred against them was that they had jointly trafficked in 841.21 grams of mixed heroin and monoacetylmorphines. According to the appellants, under the
H Dangerous Drugs Act 1952, there was no scheduled drug called "mixed heroin" (campuran heroin). In this regard, the appellants had referred to the case of *PP v. Tan Ann Chye* in which the High Court held that the charge containing "mixed heroin" was defective. The appellants also submitted that the failure of the
I prosecution to call and adduce evidence from one Liew Chee Wai had resulted in there being a gap in the prosecution's case.

Held (dismissing the appeal)
Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) The charge against the appellant was "memperedarkan dadah berbahaya iaitu 841 gram campuran heroin dan monoacetylmorphine (466.38 grams heroin and 374.83 grams monoacetylmorphine)." Reading the charge as a whole, there was no question of the appellants not knowing what they were being charged with. The type and quantity of the drugs in question as stated in the charge was the result of careful analysis carried out by the chemist whose report was tendered and produced in the trial as exh. P37. The said report confirmed the type and quantity of the drugs which was the subject matter of the charge. (paras 10 & 11)

(2) The episode that led to the arrest of the two appellants was the culmination of a series of observations and surveillance carried out by members of the raiding party, in particular, SP6, SP7 and SP9 following a tip-off. These witnesses testified that upon their observations and surveillance they saw every movement of the appellants and the handling of the drugs in question by them. Clearly, apart from the two appellants, there was no evidence of any other person being seen involved at any stage of the episode of transferring, transporting and handling of the drugs in question or anywhere in the close proximity of the Proton Wira car at the time of arrest. In the circumstances, the calling or non-calling of the witness Liew Chee Wai would not affect or change the dimension of the prosecution's case. Hence, the grounds submitted by the appellants were untenable and unsustainable. The appellants' appeal herein was therefore devoid of merit. (paras 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah disabit dan dihukum oleh Mahkamah Tinggi bagi kesalahan pengedaran dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Dalam permohonan mereka supaya mahkamah membatalkan sabitan, perayu-perayu berhujah bahawa pertuduhan terhadap mereka adalah bahawa mereka telah bersama-sama mengedar 841.21 gram campuran heroin dan monoacetylmorphines. Menurut perayu-perayu, di bawah Akta Dadah Berbahaya 1952, tiada dadah yang dijadualkan yang dipanggil "mixed heroin" (campuran heroin). Dalam hal ini, perayu-

perayu telah merujuk kepada kes *PP v. Tan Ann Chye* di mana Mahkamah Tinggi telah memutuskan bahawa pertuduhan yang mengandungi "mixed heroin" adalah cacat. Perayu-perayu juga berhujah bahawa kegagalan pihak pendakwaan untuk memanggil dan mengemukakan keterangan dari satu Liew Chee Wai telah mengakibatkan jurang di dalam kes pendakwaan.

Diputuskan (menolak rayuan)
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

(1) Pertuduhan terhadap perayu adalah "memperedarkan dadah berbahaya iaitu 841 gram campuran heroin dan monoacetylmorphine (466.38 gram heroin dan 374.83 gram monoacetylmorphine)." Membaca pertuduhan itu secara keseluruhannya, tiada persoalan timbul mengenai sama ada perayu-perayu tidak mengetahui dakwaan yang telah dipertuduhkan terhadap mereka. Jenis dan kuantiti dadah-dadah seperti yang dinyatakan di dalam pertuduhan adalah hasil analisis teliti yang dikendalikan oleh ahli kimia di mana laporannya dikemukakan semasa perbicaraan sebagai eks. P37. Laporan tersebut mengesahkan jenis dan kuantiti dadah-dadah yang menjadi halperkara tuduhan.

(2) Episod yang membawa kepada penangkapan kedua-dua perayu adalah kemuncak beberapa siri perhatian dan pengawasan yang dijalankan oleh ahli-ahli pihak serbuan, khususnya, SP6, SP7 dan SP9 berikutan satu "tip-off". Saksi-saksi ini telah memberi testimoni bahawa mengikut pemerhatian dan pengawasan yang dijalankan, mereka dapat melihat setiap pergerakan perayu-perayu dan pengendalian dadah-dadah tersebut oleh mereka. Jelas, selain daripada kedua-dua perayu, tiada bukti menunjukkan bahawa ada sesiapa lagi yang terlibat pada mana-mana peringkat episod pemindahan, pengangkutan dan pengendalian dadah-dadah tersebut atau di mana-mana yang berdekatan dengan kereta Proton Wira pada masa penangkapan itu. Dalam keadaan tersebut, memanggil atau tidak memanggil saksi Liew Chee Wai tidak akan menjejaskan atau mengubah dimensi kes pendakwaan. Oleh itu, alasan-alasan yang dihujahkan oleh perayu-perayu tidak dapat dipertahankan. Rayuan perayu-perayu ini tidak mempunyai merit.

Case(s) referred to:
PP v. Tan Ann Chye [2002] 8 CLJ 877 HC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, s. 114(g)

For the appellants - Datuk Baljit Singh Sindu (Akbardin Abd Kader with him); M/s Shukor Baljit & Partners
For the respondent - Siti Rafidah Zainuddin; Jabatan Peguam Negara

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-11-2007]

Reported by Suhainah Wahiduddin

JUDGMENT

Azhar Ma'ah JCA:

[1] Both the appellants were convicted and sentenced by the High Court Kuala Lumpur for an offence of drug trafficking under s. 39B(1)(a) Dangerous Drugs Act 1952 (DDA). The charge reads as follows:

> Bahawa kamu bersama-sama pada 15 September 2006, jam lebih kurang 6.45 petang, di kawasan letak kereta F12 Zone C, Mid Valley Brickfields, Kuala Lumpur, Wilayah Persekutuan, telah memperedarkan dadah berbahaya iaitu 841 gram campuran heroin dan monoacetylmorphines (466.38 gram heroin dan 374.83 gram monoacetylmorphines) suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun "Keseksaan".

[2] We dismissed their appeals and now give our reasons.

[3] The facts of the prosecution case as stated by the learned trial judge in his grounds of judgment are as follows:

> (a) Pada 15 September 2006 jam lebih kurang 2.50 petang, SP7 yang bertugas di Bahagian Gerakan/Operasi Jabatan Siasatan Jenayah Narkotik, Bukit Aman, telah menerima maklumat mengenai aktiviti pengedaran dadah yang melibatkan 2 orang lelaki berketurunan Cina (seorang memakai baju kuning dan

A seorang lagi memakai baju hitam), dengan menggunakan dua buah kereta iaitu Proton Wira No. Pendaftaran WHJ 7169 dan Toyota Camry No. Pendaftaran BJB 6118 di kawasan Kucai Entrepreneur Park (KEP).

(b) SP7 telah memanggil dan memberi satu taklimat untuk
B merancang tindakan yang akan diambil dan tiga pasukan telah ditubuhkan yang diketuai oleh SP7 sendiri untuk team pertama. Team kedua oleh Inspektor Ame Nur Fazila dan team ketiga oleh SP9, C. Inspektor Basri bin Husain dan SP6 Inspektor Mohd Farid.

C
(c) Pada jam 3.30 petang SP6 telah memaklumkan SP7 bahawa kedua-dua buah kereta tersebut telah dikesan di kawasan letak kereta KEP. SP6 telah membuat perhatian ke atas kedua-dua buah kereta tersebut dalam jarak 50 meter dengan menggunakan teropong, mereka berhubungan di antara team
D dengan menggunakan walkie-talkie.

(d) Pada jam lebih kurang 4pm SP6 telah nampak dua orang lelaki Cina (sasaran) berjalan kaki dari arah rumah kedai menuju ke arah kereta Proton Wira tersebut. Kedua-dua mereka telah masuk ke dalam kereta Proton Wira dan pergi
E dari KEP dengan dipandu oleh lelaki yang memakai kemeja kuning, iaitu tertuduh pertama, dan tertuduh kedua telah duduk di kerusi penumpang.

(e) SP7 kemudian telah membuat pemerhatian ke atas kedua-dua tertuduh dengan mengekori kereta yang mereka naiki dalam
F jarak 10 meter di belakang.

(f) Selepas mengekori selama lima minit, kedua-dua tertuduh telah turun daripada kereta dan masuk ke sebuah restoran Cina;

G
SP7 telah terus membuat pemerhatian ke atas kereta yang mereka naiki dan kedua-dua tertuduh.

(g) Lebih kurang satu jam kemudian kedua-dua tertuduh telah keluar daripada restoran tersebut dan memasuki kereta
H Proton Wira semula, kedua-dua tertuduh telah balik semula ke KEP, SP7 terus mengekori kedua-dua mereka dengan keretanya.

(h) Kemudian kereta Proton Wira tersebut telah diletak berdekatan dengan Toyota Camry dalam keadaan "boot to
I boot", berhadapan boot; kedua-dua boot kereta-kereta

tersebut telah dibuka dan pada masa itu SP6, SP7 dan SP9 melihat kedua-dua tertuduh telah memindahkan kotak-kotak daripada boot Toyota Camry ke dalam boot kereta Proton Wira.

(i) Selepas itu tertuduh pertama ('T1') telah memandu kereta "Proton Wira, manakala tertuduh kedua ('T2') telah memandu Toyota Camry keluar daripada kawasan KEP, SP6 dan SP7 telah mengekori kedua-dua buah kereta tersebut dalam jarak 7-10 meter di belakang.

(j) Kedua-dua kereta sasaran telah dipandu ke Mid Valley dengan diekori oleh SP7, SP9 dan pasukan; sampai di Mid Valley di tempat letak kereta Zon C, F12, kereta Proton Wira berhenti di sana, SP7 telah membuat pemerhatian lagi terhadap 'T1' yang berada di dalam kereta Proton Wira selama 10-15 minit.

(k) Kereta Toyota Camry pula telah diletakkan di lot parkir G2 Zone C dan 'T2' keluar dan berjalan kaki ke arah tempat 'T1' menunggu.

(1) Apabila 'T2' sampai, 'Ti' telah membuka boot kereta Proton Wira dan kedua-dua mereka berdiri di belakang kereta Proton Wira tersebut.

(m) SP7 telah mengeluarkan arahan, dan menjerit 'polis', pada masa itu menurut SP7 dan SP9 kedua-dua tertuduh kelihatan cemas, menggelabah dan panik, tetapi tidak cuba untuk melarikan diri, bagaimanapun berlaku pergelutan apabila SP7 hendak membuat tangkapan.

(n) Selepas pemeriksaan dibuat ke atas boot kereta tersebut SP7 telah menemui barang-barang berikut:

(i) Satu beg plastik merah (P29) di dalamnya mengandungi satu kotak serbuk pencuci jenama Daia (P26) dan di dalamnya pula mengandungi lapan bungkusan surat khabar (P27A-H), yang mana setiap bungkusan mengandungi bungkusan plastik lutsinar (P28A-H) berisi ketulan-ketulan disyaki dadah berbahaya.

(ii) Satu beg hitam (P30) di dalamnya mengandungi tujuh bungkusan surat khabar (P32A-G) setiap bungkusan mengandungi bungkusan plastik lutsinar (P33A-G) berisi bahan ketulan disyaki dadah berbahaya.

(iii) Satu kotak serbuk pencuci jenama SPIN (P34) di dalamnya mengandungi 20 bungkusan plastik lutsinar P36 (1-20) berisi bahan ketulan disyaki dadah berbahaya.

(o) Setelah selesai kedua-dua tertuduh dan kereta-kereta yang mereka naiki telah dibawa pulang ke IPD, Brickfields untuk tindakan lanjut.

(p) Barang-barang kes yang disyaki dadah telah dihantar oleh SP10, pegawai penyiasat kes, ke Jabatan Kimia Petaling Jaya untuk dianalisa, hasil analisa Ahli Kimia SP5 mendapati dan mengesahkan bahawa bahan-bahan yang dirampas tersebut itu adalah campuran heroin dan monoacetylmorphines seberat 841.21 gram. Laporan kimia ditandakan sebagai eks. P37.

[4] Based on the facts aforementioned, the learned trial judge ordered the two appellants to enter upon their defence, apparently on the following grounds:

– Hasil dari penilitian saya terhadap pengerakan dan penyimpanan barang-barang kes oleh pihak pendakwaan, saya berpuashati bahawa rantaian pengerakannya adalah kemas dan sempurna, tiada apa-apa putusan rantaian berdasarkan keterangan SP2, SP3, SP5, SP7 dan SP10.

– Mengenai elemen pemilikan, terdapat keterangan SP6, Inspektor Mohd Farid yang ditugaskan untuk membuat pemerhatian terhadap kedua-dua buah kereta tertuduh dan pergerakan tertuduh-tertuduh di KEP, di dalam keterangannya yang tiada digugat menunjukkan beliau melihat dalam jarak 50 meter dengan bantuan alat teropong, kedua-dua tertuduh telah memindahkan beg dan kotak-kotak barang kes ke dalam kereta Proton Wira daripada Toyota Camry.

– Melalui keterangan SP7 pula, beliau menyatakan "saya telah perhatikan kedua-dua suspek telah memunggah barang daripada motocar Camry masuk ke dalam motorcar Proton Wira, tetapi kedudukan saya jauh saya tak dapat pastikan apakah barang yang dipindahkan".

– Manakala keterangan SP9 pula berkata "... lelaki Cina yang memakai kemeja hitam dengan menggunakan remote telah membuka boot belakang kereta Camry hitam, kemudian kedua-dua mereka mengeluarkan kotak dan beg hitam daripada boot kereta Toyota Camry dan memasukkan ke dalam boot kereta Proton Wira Aeroback". Seterusnya dia berkata "saya lihat 2 kotak dan 1 beg".

– Semasa kedua-dua mereka ditahan di Mid Valley, kedua-dua tertuduh sedang berada di belakang kereta Proton Wira dengan boot belakang yang terbuka, walaupun belum berlaku apa-apa pemindahan oleh kedua-dua mereka, ini juga telah disaksikan sendiri oleh saksi SP7 dan SP8.

The Appeal

[5] Before us the learned counsel for the appellant ventilated two major issues as grounds of their appeal. That being the case, our deliberation in respect of this appeal will only be confined to the two issues and nothing more.

[6] Firstly, it was submitted that the charge preferred against the appellants was that they had jointly trafficked in 841.21 grams of mixed heroin and monoacetylmorphines (campuran heroin dan monoacetylmorphines). According to counsel for the appellants, under the Dangerous Drugs Act 1952 (whether the First Schedule, Part 1, Part II or even Part III) there is no scheduled drug called "mixed heroin" (campuran heroin). In this regard our attention was drawn to a High Court decision in *PP v. Tan Ann Chye* [2002] 8 CLJ 877, wherein the accused was charged with trafficking 29.8 grams of mixed heroin and monoacetylmophines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. In issue was whether the charge which contained the words "mixed heroin" was defective. Suriyadi J (as he then was) in holding the charge to be defective and thus coming to a finding that the prosecution had failed to prove a *prima facie* case against the accused had these to say.

> After a perusal of the FIRST SCHEDULE whether PART I, PART II or even PART III, I was unable to find a scheduled drug called 'mixed heroin' as per the charge submitted by the Public Prosecutor. The nearest to it was a mere 'heroin'. Without being facetious, it must be emphasised that death may be the end product of this case if found guilty. That being so, the thread of a person's life should not be taken lightly and gambled away on uncertainties let alone inept draftsmanship. The flaw here cannot be regarded as a mere procedural irregularity, as the charge, which is the very core of this whole exercise cannot just be swept away under the proverbial carpet by inane remarks in the like of "the court knows what it means". The charge must be framed in such a way that the accused person will positively, and with

A precision know what he is being charged for, so as to enable him to answer it as best as he could. If the certainty is lacking, any substantive flaw that could mislead any accused person must tilt in his favour.

B **[7]** Based on the above finding of the learned High Court judge, counsel for the appellants urged this court to quash the conviction in our present case as the uncertainty of the charge has rendered the conviction unsafe.

[8] We have anxiously considered the above issue in particular C the finding of the High Court judge in *Tan Ann Chye*'s case. Aside from reading the charge as reproduced in the learned High Court judge's judgment, we do not have the benefit of reading and perusing the other contemporaneous documents such as Sanction and Requisition under the Dangerous Drugs Act 1952, as well as D the chemist report(s) which imperatively form part of the exhibits in the trial. What we could gather and pick up from the judgment is that the accused in that case was charged with trafficking in dangerous drugs *viz* 29.8 grams of "campuran heroin dan monoaceytlmorphines" (5.2 grams heroin and 24.6 grams E monoacetylmorphines).

[9] Apparently, the learned trial judge had in his own version translated the original charge which was in Bahasa Malaysia into English, and we observe that the words "mixed heroin" was F italicised, indicating that the learned trial judge came to his finding on the basis that the drugs in the charge comprised of "mixed heroin" and monoacetylmorphines. With respect, this was not what the original charge in Bahasa Malaysia said. What was stated in the charge was "... dadah berbahaya, iaitu 29.89 gram G campuran heroin dan monoacetylmorphines (5.2 gram heroin dan 24.6 gram monoacetylmorphines)". There was no such thing as "campuran heroin" (mixed heroin) in the Bahasa Malaysia charge as understood by the learned trial judge. The breakdown of the weights of the drugs in question has been stated within brackets H ie, 5.2 grams of heroin and 24.6 grams of monoacetylmorphines. What it means is simply this. The 29.8 grams of the drugs which was the subject matter of the charge comprised of 5.2 grams of heroin and 24.6 grams of monoacetylmorphines.

I **[10]** In our instant case, similarly, the charge against the appellant was "memperedarkan dadah berbahaya iaitu 841 gram campuran heroin dan monoacetylmorphine (466.38 grams heroin

and 374.83 grams monoacetylmorphine)". Without letting oneself be besotted with technicalities what the charge really says is that the "841 gram campuran heroin dan monoacetylmorphine" comprised of 466.38 grams of heroin and 374.83 grams of monoacetylmorphines. Reading the charge as a whole there is no question of the appellants not knowing what they were being charged with.

[11] We would further add that the type and quantity of the drugs in question as stated in the charge was the result of careful analysis carried out by the chemist whose report was tendered and produced in the trial as exh. P37. The said report confirmed the type and quantity of the drugs which is the subject matter of the charge.

[12] Based on the above grounds, we have no hesitation to hold that the appellants first ground of appeal is untenable.

[13] We now move on to the second ground. It is submitted that the prosecution has failed to prove its case beyond reasonable doubt for reason that a material witness was not called during the prosecution's case.

[14] According to counsel for the appellants, the failure of the prosecution to call and adduce evidence from one Liew Chee Wai whose existence is not denied by the prosecution has resulted in there being a gap in the prosecution's case.

[15] According to the prosecution's evidence (SP10's) a statement was recorded from the owner of the car WHJ 7167 by the name of Kok Bee Lian who informed SP10 that he had earlier lent the said car to his friend by the name of Liew Chee Wai. Somehow the car was never returned to him. This led to a police report being made by the said Kok Bee Lian. It is submitted that according to the evidence of SP10 the said Kok Bee Lian has given SP10 the address of Liew Chee Wai, but no concerted efforts were made by the police to trace and secure the attendance of the witness in court. In the circumstances, it is submitted further that s. 114(g) of the Evidence Act 1950, should have been invoked by the trial judge in favour of the defence. The case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1, was cited in support of this proposition.

[16] Much had been canvassed before us respecting the drawing of adverse inference under s. 114(g) of the Evidence Act, 1950, from the non-calling of the said Liew Chee Wai. Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the evidence and circumstances of each particular case.

[17] In our instant case under appeal, it is to be noted that the episode that led to the arrest of the two appellants is the culmination of a series of observations and surveillance carried out by members of the raiding party, in particular, by SP6, SP7 and SP9 following a tip-off. These witnesses testified that upon their observations and surveillance they saw every movement of the appellants and the handling of the drugs in question by them. Clearly apart from the two appellants, there is no evidence of any other person being seen involved at any stage of the episode of transferring, transporting and handling of drugs in question or anywhere in the close proximity of the Proton Wira car at that time of the arrest. In the circumstances we are unable to see how the calling or non-calling of the witness Liew Chee Wai would affect or change the dimension of the prosecution's case.

[18] Having said that, it is our view that the second complaint grounding the appellants appeal is equally unsustainable as the first one. Thus, we conclude that the appellants appeal is devoid of merits, accordingly we dismiss it.